No. 93-960

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBIL OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

—v.—

TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR PETITIONERS

Rather than address the jurisdictional issues that are posed by the petition, Respondents Transtech Industries, Inc., *et al.* focus almost exclusively on the merits of the underlying dispute concerning whether Petitioners' settlement with the Government is sufficiently broad to grant them immunity from Respondents'

contribution claims.[1] To the extent that Respondents do attempt, albeit obliquely, to address the jurisdictional issues, their arguments implicitly concede that the collateral order doctrine applies to this appeal. Finally, Respondents seriously mischaracterize the record below.

1. Respondents do not argue that Section 113(f)(2) does not grant immunity from contribution claims to those who resolve their liability to the Government in a judicially or administratively approved settlement for all matters addressed in the settlement or that there is no conflict among the circuits on this question. Nor could they make such arguments, since, as established in Petitioners' Opening Brief, the language of Section 113(f)(2), the legislative history of that statute, the First Circuit and every court that has addressed the issue, other than the Third Circuit, has construed Section 113(f)(2) as granting an immunity from contribution claims such as those filed by Respondents against Petitioners. Instead, Respondents attempt to skirt the issues posed by this Petition by arguing the merits of the underlying dispute. They reiterate their argument that a settlement with the Government must expressly refer to and absolve settling parties' liability to third parties for the immunity provided by Section 113(f)(2) to apply. Opp. at 11-12. Not only is this argument totally

1. The statement required by S. Ct. Rule 29.1 appears at Pet. ii-viii.

unsupported by the statute, case law and EPA policy,[2] but it totally begs the question before this Court on this petition.

As set forth in Petitioners' Opening Brief at 15-20, which Respondents failed to rebut, Section 113(f)(2) grants immunity from contribution claims to those who settle with the Government concerning all matters addressed in the settlement. As this Court has repeatedly held, where the issue below is a right not to go to trial based upon a constitutional or statutory grant of immunity, an immediate appeal under the collateral order doctrine will lie to permit the vindication of that right. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993). The absence of a right of immediate appeal to vindicate a settling party's right not to go to trial under Section 113(f)(2) as a result of that party's settlement with the Government will severely diminish the incentive for parties to settle their CERCLA liability with the Government, undercutting the carrot and stick program Congress enacted in Section 113(f)(2) to decrease litigation and encourage early settlements of the

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2. EPA's policy on the language that may be used in consent decrees concerning contribution protection, which was pronounced on an interim basis in 1991, merely incorporates by reference the statute. Specifically, the standard settlement language on contribution protection states:

> With regard to claims for contribution against [Settling Defendants] for matters addressed in this [Order on Consent or Consent Decree], the Parties hereto agree that the [Settling Defendants] are entitled, as of the effective date of this [Order on Consent or Consent Decree], to such protection from contribution actions or claims as is provided in CERCLA section ["Standard" AO or Consent Decree - 113(f)(2), 42 U.S.C. §9613(f)(2)].

Interim Agency Policy on Contribution Protection Clauses in CERCLA Settlements, 22 ELR 35445 (Administrative Materials) (April 10, 1991).

Government's CERCLA claims. To resolve the conflict between the Third and First Circuits on this vitally important question, this Court should grant *certiorari*.

2. As with their approach to the question of immunity under Section 113(f)(2), Respondents argue the merits of the underlying dispute rather than address the question of whether this Court should grant *certiorari* to resolve conflicts among the circuit courts on the question of whether collateral order jurisdiction exists to vindicate by immediate appeal a right of a party not to go to trial arising out of a settlement. Respondents do not argue that collateral order jurisdiction should not lie to vindicate a right not to go to trial arising out of a settlement agreement or that there is no conflict among the circuits on this question. Rather, Respondents argue that "if this Court were to extend the collateral order doctrine to include settlement agreements, it would not be applicable to the [this] petition," Opp. at 8. However, the only reason given by Respondents for this result is that they believe they are correct on the merits of the underlying dispute (Opp. at 8-9). Once again, Respondents totally beg the question. The merits of the underlying dispute are not before this Court. Nor were they reviewed by the Third Circuit.

For all of the reasons set forth in Petitioners' Opening Brief, which Respondents have totally failed to rebut, this Court should grant *certiorari* to resolve the conflict between the Second, Fifth, Eighth and Eleventh Circuits and the Third and the Tenth Circuits on this question.

3. In arguing, improperly, the merits of the underlying controversy in their brief in opposition, Respondents so blatantly mischaracterize the record that Petitioners feel compelled to respond to correct the most egregious of these instances to restore

balance to the record and put into context the public policy ramifications of Respondents' statements.

a. Respondents' selective quotations from the decision of the district court approving the consent decree are seriously misleading. In support of their argument that the settlement did not resolve Petitioners' liability for future response costs, Respondents quote one sentence from Judge Lechner's opinion where he notes that the Government did not release Petitioners from future liability. Opp. at 4 (A32). Respondents fail to bring to the Court's attention or to even mention the next two sentences of Judge Lechner's decision, which go on to discuss the Government's broad *covenant not to sue* Petitioners for any future response costs or response actions. (A32). As discussed in the opinion (A32) and as set forth in the consent decree (A21-22), Paragraph 7(a) and (b) of the consent decree provide a broad covenant not to sue Petitioners for *any* future response costs or *any* future response actions arising out of the Kin-Buc site subject to only one condition, namely that the Government is unable to obtain such relief from any other non-settling party at the site. It is undisputed that this condition has not occurred and that the covenant not to sue in the consent decree bars the Government from taking any action against Petitioners concerning the remediation of the Kin-Buc site, including an action to compel Petitioners to perform the very same actions that form the basis of Respondents' claims for contribution against Petitioners or an action to collect from Petitioners the cost of performing those same response actions.

Conditional reopeners are expressly provided for in CERCLA, *see, e.g.*, 42 U.S.C. §122(f)(6), and are routinely used by the Government in CERCLA consent decrees to protect against a variety of future conditions. *See, e.g.*, United States Environmental Protection Agency Model CERCLA RD/RA Consent Decree, 56

Fed. Reg. 30996 at §§ 80-83 (1991). These provisions are salutary as they facilitate settlements while protecting the Superfund against specified future contingencies. No court has ever held that the presence of such conditional reopeners vitiates a party's rights under Section 113(f)(2). At least one court has expressly held that as long as the condition does not occur, settling parties are entitled to immunity from contribution claims under Section 113(f)(2) and has dismissed all such claims against those parties. *United States v. Rohm & Haas, et al.*, No. 85-4386 (D.N.J. Sept. 14, 1990), App. 7a-10a. Indeed, given the prevalence of conditional reopeners and the express provision for them in CERCLA, Respondent's position that, without a full release of future liability a party has not resolved its liability for purposes of Section 113(f)(2), completely undermines Section 113(f)(2) and makes the statute internally inconsistent.[3]

b. Respondents repeatedly quote out of context in a most misleading way the portion of Judge Lechner's opinion that deals with Paragraph 8(c) of the Consent Decree, a paragraph that specifies affirmative action the Government must take in the event non-settlors attempt to join the settlors to any future enforcement action that the Government may institute against non-settlors. Opp. at 4, 6, 10. For example, Respondents state:

> Further, Judge Lechner, the District Court Judge approving the Consent Decree, specifically held at the time the

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3. Moreover, Respondents' position is inconsistent with the language of Section 113(f)(2), which does not grant immunity to "a party who has obtained a release of its liability from the United States" but rather it grants immunity to "a party who has resolved its liability to the United States," far broader language that encompasses any form of putting to rest the Government's claim, such as by a covenant not to sue as to future liability.

settlement was approved that an objecting Non-settling Party "may seek contribution from the settling parties . . . ."

Opp. at 10.

The portion of Judge Lechner's opinion to which Respondents refer never purported to address the rights of the settling parties under Section 113(f)(2). Rather, it addressed only an objection by a non-settling party to the inclusion of Paragraph 8(c) in the Consent Decree. Specifically, the court focused solely on the question of under what circumstances *the Government* would be compelled by Paragraph 8(c) to take affirmative action to oppose an attempted joinder by non-settlors of settling parties to any future direct enforcement action that the Government might institute against non-settlors. (A40) The full passage from the opinion makes clear that Judge Lechner merely noted that, if the non-settling party complied with all of its legal obligations so that no direct enforcement action was brought against it by the Government, Paragraph 8(c) will not apply and the non-settling party may seek contribution from settling parties *without opposition from the Government* under Paragraph 8(c). The court did not state or even suggest that future contribution claims by non-settlors could be made without opposition from the settling parties under Section 113(f)(2). The language of the court concerning Paragraph 8(c) has no bearing on this case. Paragraph 8(c) has never been invoked in these proceedings, nor could it be, since the Government has not commenced a direct enforcement action against any non-settling parties.

* * *

The conflict that exists between the First and the Third Circuits regarding whether 42 U.S.C. § 9613(f)(2) provides immunity from contribution claims rather than a mere defense to liability and the effect of this conflict on whether a settling party

can vindicate its right not to go to trial by immediate appeal of a district court decision denying its claim of immunity raises an important federal question that has a major impact on Congress' scheme to encourage parties to settle CERCLA claims commenced by the Government and, thus, to facilitate the timely and cost-effective clean up of our nation's hazardous waste sites. In addition, as this Court has already recognized in granting a writ of *certiorari* in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 379 (1993), a conflict exists among the circuits as to whether a right not to go to trial arising out of a settlement agreement is immediately appealable. Since Petitioners' claim of a right not to go to trial is based on its settlement agreement with the Government and Section 113(f)(2), it raises public policy concerns that may not be presented by settlements between two private parties. This Petition, therefore, contains a dimension not presented by the private party settlement in the *Desktop* case. For all of the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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